No. 13,439

IN THE

United States Court of Appeals

For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY (a corporation),
Respondent-Appellant,

vs.

UNITED STATES OF AMERICA,
Libelant-Appellee.

BRIEF FOR THE UNITED STATES, APPELLEE.

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This is in reply to appellant's opening brief in an appeal to the United States Court of Appeals for the Ninth Circuit from a final admiralty decree of the United States District Court for the Northern District of California, Southern Division.

JURISDICTION.

The proceeding was begun by a libel *in personam* by the United States against appellant on the admiralty side of the District Court to recover damages

for a collision on San Francisco Bay between the Government-owned SS GOLDEN GATE and appellant's tug, HENRY J. BIDDLE. From a final decree in favor of the libelant, respondent has taken this appeal.

The admiralty jurisdiction of the District Court is founded on Art. III, sec. 2, of the United States Constitution and sec. 1333(1) of Title 28, U. S. Code.

Jurisdiction of this Honorable Court of Appeals exists under the same section of the Constitution and Sections 41, 1291 and 2107 of Title 28, U. S. Code, petition for appeal and allowance thereof (Apostles, p. 27) having been duly filed within ninety days from entry of final decree in the District Court (Apostles, p. 26.)

STATEMENT OF THE CASE.

The case is a simple collision case wherein the United States seeks to recover the estimated cost of repairs to the Government-owned vessel SS GOLDEN GATE arising out of the admitted negligence of the respondent's vessel, tug HENRY J. BIDDLE. The facts are set out in great detail in appellant's opening brief. More generally they are as follows:

The case was tried on a stipulation of facts wherein respondent-appellant admitted sole liability for damages arising out of the collision, limiting its liability, however, to the value of the offending vessel at the time of the collision. The right to limitation was con-

ceded by the Government. It was stipulated by the parties that the estimated cost of repairs of $5,400 was reasonable and that the owners of the offending tug are entitled to limit liability to $1,500, being the reasonable value of the tug at the time of the collision.

The respondent-appellant admits liability for $250 expended by the Government for temporary repairs, but denies liability for the remainder of the estimated cost of permanent repairs up to the limit of $1,500.

The sole issue, then, is the often-decided one of what is the proper measure of damages in a collision case where the owner of the damaged vessel chooses not to repair. It is conceded by the appellant that an owner of a damaged vessel need not repair, and that as a general rule of law is entitled to recover from the party responsible for the collision the reasonable estimated cost of making such repairs. (Appellant's brief, pages 9 and 10.) The appellant seeks to escape liability on the ground that the damaged vessel was subsequently sold in the unrepaired state in accordance with the provisions of the War Surplus Sales Act (50 U.S.C.A. [Appendix] 1736) and provisions thereunder (46 C.F.R. 299.56) for the only amount for which the vessel could have legally been sold.

The District Court ruled that "damages in collision cases, when repairs are not made, can be measured either by estimated cost of repairs at a time immediately following the accident, as libelant seeks to do here, or by the diminution in market value of the

vessel. To avoid the influence of market fluctuation and price changes, either of these methods must be accomplished as soon after the collision as is reasonably possible." (Apostles, pages 19-20.)

SUMMARY OF ARGUMENT.

The appellee's argument can be reduced to the following points:

1. There is no reason in this case to deviate from the established rules of law for measuring collision damages.

2. The sale at the statutory sale price has no evidentiary significance in determining the damage to the vessel by reason of the collision.

3. A tort-feasor cannot escape the consequences of his wrongdoing merely because his victim is fortunate enough to receive reparation from a collateral source.

ARGUMENT.

A. THERE IS NO REASON IN THIS CASE TO DEVIATE FROM THE ESTABLISHED RULES OF LAW FOR MEASURING COLLISION DAMAGES.

It is the established rule in collision cases that the injured party is entitled to recover the difference between the *market* value of the vessel in her damaged condition and her value before the collision. As the Court said in *La Champagne,* 53 Fed. 398 at page 399 (D.C. S.D. N.Y. 1892):

> "There are two methods of arriving at the difference: Proof of the schooner's *market* value before and after the collision respectively, and the other, by proof of the cost of repairs and of putting her in as good a condition as before." (Emphasis supplied.)

See, also:

The Rhode Island, 20 F. Cas. No. 11,740a;
The Pocahontas, 109 F. (2d) 929;
The Super-X, 15 F. Supp. 294;
Pan-American Petroleum Trans. Co. v. U. S., 27 F. (2d) 685.

The Government has chosen the second method for the very simple reason that there is no available evidence as to the vessel's market value after the collision.

The argument presented by the appellant, if accepted, would introduce an entirely new and unworkable theory for measuring damage. The appellant suggests that the measure of damage in a collision case should be based upon the ultimate financial outcome to the owner of the damaged vessel and not upon the depreciation in value of the vessel or upon the cost of her repairs at the time of the collision. A simple example will show that this is an improper method. An owner could be operating a vessel at an economic loss. By reason of a collision he is forced to sell the vessel and thereby incurs a financial saving. The tort-feasor certainly cannot be allowed to come in and set off this saving against the damages

done the vessel. The ultimate financial outcome to the owner cannot be the test. Too many extraneous factors enter into such a measure. The only true tests are the value of the vessel prior to the collision as compared to her value immediately after the collision, or the cost of repairing the damage, estimated or actual.

B. THE SUBSEQUENT SALE AT THE STATUTORY SALE PRICE HAS NO EVIDENTIARY SIGNIFICANCE IN DETERMINING THE DAMAGE TO THE VESSEL BY REASON OF THE COLLISION.

The only two ways of measuring collision damages that are recognized by the Courts are:

1. Actual or estimated cost of repairs.
2. Diminution in market value immediately following the collision.

The fact of a subsequent sale eighteen months later, to be relevant, must go to one of these two methods.

Obviously it does not pertain to actual or estimated cost of repairs, nor does it pertain to diminution in market value immediately following the collision.

The statute under which this vessel was sold was not even in existence at the time of the collision, and the sale itself did not take place until fourteen months after the collision. (Stipulation of Facts VII, Apostles, pages 23-24.)

It is basic law that the damages are to be estimated at the time of the collision.

The Nantasket, 290 Fed. 813 (D.C. D.Mass. 1923).

It is incumbent upon the appellant to show that the vessel was not of less value after the collision than prior to the collision. The appellant does not discharge that burden by simply showing a sale fourteen months later at a statutory sale price; he must go further and show that the sale price fairly reflected the value of the vessel in its undamaged state on July 12, 1945.

The case of *The Nantasket,* 290 Fed. 813, supra, is a case similar to this, arising out of the sale of a submarine chaser at the end of World War I. In that case an old submarine chaser was damaged by collision while being used as a ferry. She was subsequently sold for a lump sum along with other vessels. There was no evidence as to her value before and after the accident, but there were estimates of the cost of repairs. The Court said, at page 4:

> "It seems to me a fair inference in view of the lack of evidence to the contrary, which could easily have been produced, that the No. 125 (the vessel) was worth before the accident the average price at which similar vessels sold, and that after the accident she was worth that price, less the cost of putting her into her previous condition; i.e., less the cost of repairs. * * * I am of the opinion on the facts stated that a prima-facie case is made out entitling the Government, as owner of the vessel, to damages in the amount which it would have cost to repair her immediately after the accident."

The appellant contends that the District Court erred in finding that the subsequent sale at the statu-

tory sale price had no bearing on the issue of damages, and in support of this contention cites numerous cases supporting the statement that *"a sale is frequently used to measure recoverable damages by crediting proceeds against sound value in order to arrive at the amount of loss."* (Quotation from Appellant's Opening Brief, page 7, emphasis theirs.)

The very words used by the appellant show that the sale at the statutory price has no significance. There is no evidence as to the sound value of the vessel prior to the collision, so there is nothing against which the statutory sale price can be credited or compared.

The provisions of the Act establishing the minimum sales price of these vessels made it illegal to sell this vessel at a price lower than $957,818. (Stipulation of Facts IX, Apostles p. 17; Findings of Fact IX, Apostles p. 24.)

Appellant makes much of the fact that the purchasers did not request nor did they receive a reduction in price by reason of the collision damage. The only thing that this proves is that the Maritime Administration and the purchaser complied with the law. It would have been illegal to sell the vessel at any reduction in price.

In concluding this point, it is repeated that if the subsequent sale is to have any evidentiary significance, it must be shown that it has some bearing upon the comparison between market value before and after the collision. It obviously has no bearing on *market*

value. It was the only legal price at which it could be sold and consequently we have no idea what the market price for such a vessel was, or would have been. Secondly, it was not a sale immediately following the collision. For example, let us suppose a vessel was worth $5,000 in sound state and was damaged so that repairs would cost $1,000. The market price after the collision is $4,000. But let us assume that eighteen months passes and the market rises to $6,000. This rise, or drop, as the case may be, would not be significant as to the diminution in value caused by the collision. It is equally obvious that a statutory sale eighteen months after a collision has no bearing on the measure of damages to which the appellant seeks to apply it. In collision cases, the value of the vessel in its sound as well as its damaged state must be established at the date of the collision.

C. A TORT-FEASOR CANNOT ESCAPE THE CONSEQUENCES OF HIS WRONGDOING MERELY BECAUSE HIS VICTIM IS FORTUNATE ENOUGH TO RECEIVE REPARATION FROM A COLLATERAL SOURCE.

It is submitted that the holding of the District Court has been erroneously interpreted by the appellant with regard to this point. The appellant in its brief argues that the sale of the vessel does not constitute reparation from a third party, and thereby impliedly argues that the District Court held that it did. The District Court held:

> "Although it is not felt that the subsequent sale at the statutory sales price necessarily con-

> stituted a reparation for the collision damages, in any way, the application of *res inter alios acta,* as above stated, would prevail against respondent's contention." (Memorandum Opinion, Apostles, p. 20.)

Thus it is clear that the District Court *did not hold* that the sale at the statutory price constituted reparation from a third party as appellant's brief seems to assume.

It was not the sale that was the act of a third party, *but the third party's willingness to accept the vessel, repair it at its own expense, and make no charge to the Government.*

It is exactly the same as if the Government had had the vessel repaired in a private shipyard, and for some reason known only to the owners of the shipyard, the invoices were marked paid and no actual collection ever made from the Government. In such a situation the law is clear, and as pointed out by the District Court, citation of authority would appear unnecessary; however, for amplification, the section of the Restatement of Torts cited by the District Court in its Memorandum Opinion (Apostles p. 20) is quoted as follows:

> "* * * The plaintiff is not barred from recovery merely because he suffers no net loss from the injury, as where he is insured or where friends make contributions to him because of the loss. If his things are tortiously destroyed, the insurance carrier is subrogated to his position. In other cases the damages which he is entitled to recover

> are not diminished by the fact that, either as a matter of a contract right or because of gifts, the transaction results in no loss to him. Where a person has been disabled and hence cannot work but derives an income during the period of disability from a contract of insurance or from a contract of employment which requires payment during such period, his income is not the result of earnings but of previous contractual arrangements made for his own benefit, not the tort-feasor's. Likewise, the damages for loss of earnings are not diminished by the fact that his employer or a third person makes gifts to him even though these have been given because of his incapacity. Further, he may be able to recover for the reasonable value of medical treatment or other services made necessary by the injury although these have been donated to him."
>
> *Restatement of Torts,* 1939 Edition, Section 920, Comment c.

The case here is similar in some respects to the case of *Agwilines, Inc. v. Eagle Oil & Shipping Co.,* 153 F. (2d) 869, wherein the question was one of detention loss arising out of collision. The damaged vessel was at the time of the collision chartered by the United States, and under the terms of the charter the United States was required to pay one-half charter hire during the detention period. The owner of the damaged vessel sought to recover full detention loss from the tort-feasor on the ground that payment of one-half charter hire was *res inter alios acta.* The Court agreed that the payment was in effect *res inter alios acta,* but refused to apply the rule because it

was felt that the libelant had suffered no primary loss. The Court held that the libelant had given up the use of the vessel by virtue of the charter, and therefore could not recover for the loss of use, but could only recover that which the collision deprived him of under the contract.

The dissenting opinion written by Judge Clark states as follows:

> "I take it as agreed that but for the payment by the United States to the libelant of a portion of the charter hire, pursuant to the charter, libelant would recover complete compensation for the loss of use of its vessel due to claimant's act—computed here at the charter rate, since that was the only evidence of value offered. That being so, we have the rather startling result that claimant receives the bonanza of a substantial reduction in damages through the mere chance that its victim has a favorable contract with another. * * *"
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> * * * * * * *
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> "For in admiralty, as well as at law, there is no more solidly established principle than that payments or reparations of whatever nature which the injured party receives from a collateral source are, in the words of the courts, res inter alios acta, of no concern to the wrongdoer."

The problem is very well analyzed by Judge Clark, and for the convenience of the Court the decision is quoted at length below.*

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*"'I take it as agreed that but for the payment by the United States to the libelant of a portion of the charter hire, pursuant to the charter, libelant would recover complete compensation for the loss of use of its vessel due to claimant's act—computed here

It can be seen in the cited case that the Court in the majority decision refused recovery because they felt the libelant had suffered no primary loss during the period of detention. In the present case the primary loss is admitted by appellant, for in his brief

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at the charter rate, since that was the only evidence of value offered. That being so, we have the rather startling result that claimant receives the bonanza of a substantial reduction in damages through the mere chance that its victim has a favorable contract with another. * * *''

* * * * * * *

''For in admiralty, as well as at law, there is no more solidly established principle than that payments or reparations of whatever nature which the injured party receives from a collateral source are, in the words of the courts, res inter alios acta, of no concern to the wrongdoer. (Restatement, Torts, 1939, §920, comment e; Sutherland on damages, 4th Ed., Berryman, 1916, §158, p. 487, and cases cited p. 488, n. 42, id. § 1295, p. 5014; Hale, Law of Damages, 1912, §§43-45, p. 186. This has been held true of compensation from an insurance company, The Steamboat Potomac v. Cannon, 105 U.S. 630, 26 L.Ed. 1194; The Propeller Monticello v. Mollison, 17 How. 152, 58 U.S. 152, 15 L.Ed. 68; Phoenix Ins. Co. v. The Steamboat Atlas, 93 U.S. 302, 23 L.Ed. 863; Mobile & Montgomery R. Co. v. Jurey, 111 U.S. 584, 4 S.Ct. 566, 28 L.Ed. 527, of payments under the Railroad Retirement Act, 45 U.S.C.A. §228a et seq.; McCarthy v. Palmer, D.C.E.D. N.Y., 29 F.Supp. 585, affirmed 2 Cir., 113 F.2d 721, certiorari denied Palmer v. McCarthy, 311 U.S. 680, 61 S.Ct. 50, 85 L.Ed. 438, or a state compensation act, N.L.R.B. v. Marshall Field & Co., 7 Cir., 129 F.2d 169, 144 A.L.R. 394, affirmed Marshall Field & Co. v. N.R.L.B., 318 U.S. 253, 63 S.Ct. 585, 87 L.Ed. 744; Sprinkle v. Davis, 4 Cir., 111 F.2d 925, 128 A.L.R. 1101, and of hospital and medical expenses received from a state industrial commission, Overland Const. Co. v. Sydnor, 6 Cir., 70 F.2d 338.)

''Nor is the rule confined to reparations which may be classified as insurance or indemnity where the injured party or someone acting in his behalf has contributed to the fund from which payment is made. Thus an owner may recover damages for injury to his buildings, although the terms of his lease require the tenant to continue payments. S.H. Kress Co. v. Bullock Shoe Co., 5 Cir., 56 F.2d 713. In nearly all jurisdictions, an employee may recover full damages for personal injuries, although he has received wages from his employer during the period of illness, Shea v. Rettie, 287 Mass. 454, 192 N.E. 44, 95 A.L.R. 571; Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374, 53 A.L.R. 771; Hayes v. Morris &

it is stated, "We freely concede that the collision in this case caused a possible diminution in the 'market value' of the GOLDEN GATE. If suit had been filed and tried before passage of the Surplus statute, the estimated cost of repairs could perhaps have been

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Co., 98 Conn. 603, 119 A. 901—a view which I understand my brethren to accept in citing this line of cases favorably. And an injured party may include as part of his damages medical services, although they have been gratuitously performed or paid for by relatives. Chicago, Duluth & Georgian Bay Transit Co. v. Moore, 6 Cir., 259 F. 490, certiorari denied 251 U.S. 553, 40 S.Ct. 118, 64 L.Ed. 411. See annotation 128 A.L.R. 687.

"These decisions are so identical with the facts here that the attempt to distinguish this case as one where the libelant suffered no 'loss,' I can regard only as question begging—so much so in fact that I confess to surprise that so purely verbal an argument is urged. It is most starkly stated by claimant when it says the cases are 'clearly distinguishable' because 'in all of them plaintiff sustained the primary loss and thereafter received reimbursement by way of insurance or gratuity.' Here, just as surely, plaintiff sustained the *primary* loss (whatever significance that adjective may be thought to bring to the issue) and was definitely in the red until the loss was made good by the payments from the United States. And here the wrongdoer receives the windfall advantage which those cases deny him. Indeed, the cases which most emphatically announce the rule of 'actual loss' apply it at the same time and with entire consistency with the principle here contended for. See especially The Steamboat Potomac v. Cannon and Phoenix Ins. Co. v. The Steamboat Atlas, both cited supra. And see further the line of cases permitting recovery by a shipowner for loss of earnings, notwithstanding the availability of spare boats. The Cayuga, C.C.E.D.N.Y., Fed.Cas. No. 2,537, affirmed 14 Wall. 270, 81 U.S. 270, 20 L.Ed. 828; The Favorita, C.C.E.D.N.Y., Fed.Cas. No. 4,695, affirmed 18 Wall. 598, 85 U.S. 598, 21 L.Ed. 856; The Emma Kate Ross, 3 Cir., 50 F. 845. Indeed, we followed this principle in Pool Shipping Co. v. United States, 2 Cir. 33 F.2d 275, a case of persuasive authority here. For there we rejected the tort-feasor's argument that the libelant hull-owner's damages should be reduced by the amount of the general average contribution he had collected from cargo.

"I do not think these persuasive precedents of the law of damages should be repudiated for an unorthodox doctrine which can serve only to penalize the prudent and provident shipowner. I would reverse for the grant of damages for the loss of use, as claimed."

used as being, *at that time,* the best available method of measuring that loss in value." (Appellant's Opening Brief, page 19.)

It seems abundantly clear, in view of this admission, that the fact that the Government secured a purchaser for the vessel which was willing to absorb the price of repairs was, as respects the appellant-tort-feasor, *res inter alios acta.*

APPELLANT'S CASES DISTINGUISHED.

As previously stated, the appellant has presented the argument that the sale of the vessel was not a reparation from a collateral source, apparently in the belief that the District Court held that it was. As pointed out herein, it is the Government's position that the District Court did not hold that the sale itself constituted reparation from a collateral source, and that the fact that the Government found a buyer who was willing to absorb the cost of repairs was the *res inter alios acta.*

Appellant cites numerous cases in support of the argument that "a sale is frequently used to measure recoverable damages by crediting proceeds against sound value in order to arrive at the amount of the loss". (Appellant's Opening Brief p. 7.) In each of the cases appellant cites, there was evidence of sound value against which the sale price could be compared. In this case there is no evidence of sound value prior to the collision against which the statutory price can

be compared. Consequently, the cases cited by appellant are not in point.

The appellant cites *The Marie Palmer,* 173 Fed. 569 (E.D.Pa.) (Appellant's Opening Brief p. 8). In that case the sound value of the vessel was $8,000. After the collision she was sold for $4,100. The Court awarded $3,900 as the damages for diminution in value as a result of the collision. In that case there was available the estimated sound value before the collision and the actual market value after the collision. In the present case we have neither. Admittedly a subsequent sale immediately following a collision at a market price has bearing on the issue of damages when the sound value prior to the collision is available. A sale at a statutory price fourteen months after the collision has no bearing.

The case of *Hubbard v. U. S.,* 92 Ct. Cl. 381 (Appellant's Opening Brief p. 8), wherein the amount of damages was determined by crediting the net proceeds of a sale of a wreck against the cost of raising it can be disposed of as being inapplicable by the same reasoning as above.

The libelant cites *The Dunbritton,* 73 Fed. 352 (2nd Cir.) (Appellant's Opening Brief pp. 8-10), which involved damage to cargo of nux vomica and tumeric which received oil stains in the packaging. The damage was estimated to be $3,600 but in fact it was sold for the full market price. No recovery for damage was allowed. This case is distinguishable for once again there is a comparison between sound value be-

fore damage and market price after damage, which there is not in the present case. In the cited case it was shown there was no diminution in value. In the present case the diminution in value is admitted.

The case of *The Winfield S. Cahill,* 258 Fed. 318, cited by appellant (Appellant's Opening Brief p. 10), is another case where a sale after alleged damage brought the full market price. Once again it necessarily implies a comparison between sound value before alleged damage and market price immediately thereafter. Neither of these two factors is available for comparison one against the other, in the instant case.

The appellant quotes from *The Rhode Island,* 20 Fed. Cas. No. 11,740a (S.D.N.Y.), on page 10 of appellant's brief. This case involved the question of loss due to detention of the vessel, not loss due to diminution in value. Opinion from which appellant quotes, goes on to say, immediately following the appellant's quoted portion:

> * * * "Although there may be difficulty in defining precisely the particulars composing such actual loss, it clearly includes more than the mere damage to the vessel herself." * * *
>
> "Then, again, as to the measure of the direct injury, the party demanding damages may ascertain them by the judgment and valuation of witnesses, and recover on such valuation without waiting to repair, or attempting to repair his vessel; or he may await the completion of proper

> repairs, and then claim the expenditures reasonably laid out in her reparation." * * *
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> "To these rules neither party raises any specific objection. The point of controversy is, whether the owner is also entitled to a recompense for being deprived of the use of his vessel for the time she is necessarily detained in receiving repairs." * * *

From the above it can be seen that the question decided by the Court has no bearing here, but in the course of the decision, the Court clearly states the two accepted methods for determining damages to the vessel in collision cases.

The Pocahontas, 109 F. (2d) 929 (2nd Cir.), cited by appellant (Appellant's Opening Brief pp. 11-14), was also a case involving damages for loss of use of the vessel during the detention period. The question was one of whether or not the loss of use was a proximate result of the collision. There is no causation question in the present case. However, in the course of the decision this Court in discussing the physical damage, reiterated what has been said here regarding hull damage where at page 931 it is stated:

> "Strictly, the measure of damages is the difference in value of the ship, before and after the collision, but the cost of necessary repairs and loss of earnings, while they are being made have long been regarded as its equivalent." Citing *Pan American-Pet. Trans. Co. v. U. S.,* 27 Fed. (2d) 685.

In support of the argument that the well established rules of measuring damages in collision cases need not apply here, appellant cites two cases involving the measure of damages under the law of contracts.

The *Ill. Central Ry. v. Crail,* 281 U.S. 57 (cited in Appellant's Opening Brief p. 11), involved the failure to deliver coal to a retail dealer, and the question was whether or not under the facts the retail dealer was entitled to the resale price of the undelivered coal or the wholesale price. The decision was made entirely upon interpretation of the Cummins Amendment to the Uniform Sales Act and has little bearing on the measure of damages in a tort case. The Government did not operate the GOLDEN GATE for the purposes of a sale, and it is pointed out by counsel in the report of the decision in the cited case, that they were trying to arrive at damages for shortage of goods intended for resale, not goods intended for retention.

The second case, *S. P. Ry. v. Gonzalez,* 61 P. (2d) 377, 48 Ariz. 260 (Appellant's Opening Brief p. 12), is also a contract case involving a subsequent sale at a contract price below market value. Tomatoes arrived damaged. Sound market was $3.50 per box, but the consignee had already contracted to sell for $2.75. Because of damage they sold at $1.25. The Court compared the sale price to the contract price to determine damages. This does not appear to be any variation in the normal rules of damages as

applied to torts interfering with contracts of sale, and does not illustrate a deviation from the established rules of measuring damages.

The appellant states, at page 13 of the appellant's opening brief, "In the District Court, libelant argued that the collision brought about an immediate depreciation in the value of the ship, for which an action vested, and that the cause of action could not be affected by subsequent legislation or a later sale under such legislation. We know of no rule which says that events after the tort cannot or should not be considered in fixing compensatory damages."

The remainder of the cases cited by appellant are cited to show that subsequent events can be considered to determine compensatory damages.

The Government did not argue in the District Court that subsequent events *per se* cannot affect the cause of action, but it was argued that the subsequent event must have some evidentiary significance to the issue. *The legislation and subsequent sale of this vessel under the legislation is a subsequent event which is without evidentiary significance in determining the diminution in value immediately following the collision.*

In *The City of Chester,* 34 Fed. 429 (S.D.N.Y.), cited by appellant (Opening Brief p. 13), the estimated cost of repairs was higher than the actual cost when subsequently made. Of course, the actual cost of repairs has evidentiary significance on damages

and was correctly the proper basis of determining recovery. We, of course, concede that when actual repairs are made the actual cost is the proper measure of damages, but it is conceded by appellant that when repairs are not made the reasonable estimated cost is recoverable.

The cases of *Carslogie SS Co. v. Royal Norwegian Government,* 1952 A.M.C. 652 (H. of Lords), and *The Pocahontas,* 109 F. (2d) 929 (2nd Cir.), cited by appellant (Appellant's Opening Brief pp. 13-14), both involve damages for detention. The subsequent events had a direct effect on the actual loss of use of the vessel. The legislation and subsequent sale for a statutory price cannot have any direct effect upon the diminution in value of the vessel immediately following the collision.

The appellant cites *Sider v. Gen. Elec. Co.,* 238 N.Y. 64, 143 N.E. 792, and *Cooper v. Shore Elec. Co.,* 63 N.J.L. 558, 44 Atl. 633, and *Van Beeck v. Sabine Towing Co.,* 300 U.S. 342, 81 L. Ed. 685, 57 S. Ct. 452 (Appellant's Opening Brief p. 15). All of these cases involve an action for wrongful death wherein the beneficiary of the cause of action died prior to the trial. The Courts limited damages to the estate of the deceased plaintiff to the actual pecuniary loss occasioned by the wrongful death which accrued during the lifetime of the plaintiff, instead of allowing an amount estimated on the life expectancy of the plaintiff. This case would be analogous to a situation where cost of repairs to a vessel were estimated to be $10,000 but prior to the trial, the actual repairs were

made and found to cost only $5,000. The cited cases would seem to have no bearing on an unrepaired damage case, nor do they show any way of making the subsequent sale of a vessel at a statutory sale price evidentially significant to the issue of diminution in value by reason of the collision.

The appellant cites also *Kings v. Bangs,* 120 Mass. 514 (Appellant's Opening Brief p. 16), regarding the mortgagee's right to recover against a tort-feasor damaging the security property. In this regard appellant also cites *Sloss-Sheffield v. Wilkes,* 231 Ala. 511, 165 So. 764, 109 A.L.R. 385 (Appellant's Opening Brief p. 17). These cases hold that a mortgagee could not recover against a tort-feasor for damage to the security property when the property in fact subsequently sold for enough to pay the mortgage debt. It is submitted that in the present case the Government is in a position more analogous to that of a mortgag*or* whose property is damaged, and when the property is subsequently sold the mortgag*or* obtains enough to pay off the mortgage debt. It certainly cannot be said that this could affect his rights against the tort-feasor for damage to his property.

Lastly, the appellant cites *The Super-X,* 15 F. Supp. 294 (S.D.N.Y.) (Appellant's Opening Brief p. 17). This is another case involving damages arising from detention of the vessel. In this case a tank barge was damaged and it was estimated that the repair work would cost $110 and gas-freeing and towing $850. The collision damage did not necessitate the immediate gas-freeing and towing nor lay-up for

repairs; however, subsequent leaks developed that did necessitate these expenditures. The Court did not allow detention or the cost of gas-freeing and towing because they found the libelant could not have reasonably incurred these charges as a result of the collision, but must reasonably await some time when it was necessary to drydock the vessel, regardless of the collision. In other words, the extra expenses were not a proximate result of the collision. The Court in this case repeats the rule regarding physical damage to the vessel as quoted in appellant's brief at page 18, wherein it is stated, "What is allowed in cases of no repair is the depreciation in value." The remainder of appellant's quotation applies solely to whether or not a prospective purchaser would be justified in demanding a reduction in price to compensate him for estimated detention and towing and gas-freeing, and since the owner could not have recovered these items under the facts, then neither would a prospective purchaser have been entitled to such a reduction, so there was no diminution in market price in the amount of these items. The diminution in the value of the vessel as a result of the collision is admitted in the present case. Appellant's argument that since the prospective purchaser did not receive a reduction in price, the owner cannot recover for the damage, attempts to apply a converse of the cited case, which is not true in the present case, for it is admitted herein that the Government could have recovered the estimated cost of repairs had the suit been brought prior to the sale. In the cited case it is

held that as to the items in dispute the owner could not have recovered.

The appellant's closing argument is nothing more than a repetition of the time-worn argument used in cases where the injured party has received reparation from a collateral source, and the tort-feasor argues that the injured party should not be doubly compensated. The courts have consistently refused to honor this contention.

As was pointed out by Judge Clark in the quoted opinion in *Aqwilines, Inc. v. Eagle Oil & Shipping Co.* (supra) that if such an argument were accepted,

> "we have the rather startling result that the claimant (tort-feasor) receives the bonanza of a substantial reduction in damages through the mere chance that its victim has a favorable contract with another."

CONCLUSION.

For the foregoing reasons it is felt that the District Court was correct in ruling that the only acceptable methods of determining damage in a collision case is by determining the diminution in the market value resulting therefrom, and that the estimated cost of repairs is the only evidence available in this case upon which to make that determination. The subsequent sale of the vessel fourteen months after the collision under the provisions of a statute passed eight months after the collision, for the only legal price at which the vessel could be sold has no evidentiary

significance on the diminution of market value of the vessel. The fact that the Government found a corporate purchaser for the vessel that was willing to absorb the cost of repairs to itself is *res inter alios acta,* and cannot be a fact used by the tort-feasor in seeking to escape the consequence of its admitted negligence.

That the judgment herein should be affirmed is

Respectfully submitted,

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